Supreme Court, U.S.
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No. 97-0291

In The

Supreme Court of the United States

October Term, 1996

SALLY B. KIRMAN and JOHN G. KIRMAN,

Petitioners,

vs.

COMPAGNIE FRANCAISE DE CROISIERES,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second District, Division Three

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondent is Compagnie Francaise de Croisieres ("CFC"), a French corporation with its principal place of business in Paris, France. At the time of the incident in 1991 from which this lawsuit arises, CFC was owned by two French corporations, and its officers and directors were French. There were no United States ownership interests in CFC. At the present time, CFC is owned by Costa Crociere SpA, an Italian company with its principal place of business in Geneva, Switzerland. CFC no longer has any subsidiaries, either wholly owned or nonwholly owned.

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REASONS FOR DENYING THE WRIT

I. INTRODUCTION.

The action underlying this Petition involves personal injuries to a passenger aboard a Bahamian-flagged cruise ship in Indonesian waters. Aside from the fact that many of the passengers were U.S. residents, the ship had no connection with the United States. It was owned by a Swiss company and operated by a French company. Its base of operations was Paris, France, and at the time of the accident it was on a voyage from Singapore to Australia. Applying the maritime tort choice of law principles set forth by this Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970), the California trial court held that Bahamian law applies and that the cruise line's liability is therefore limited by the Athens Convention for the Carriage of Passengers by Sea, to which the Bahamas is a signatory. The respondent cruise line, while denying any fault, tendered the full amount recoverable under the Athens Convention and moved for summary judgment, which was granted. The California Court of Appeal affirmed the judgment in a unanimous, unpublished opinion, and the California Supreme Court denied review.[1]

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[1] Petitioners repeatedly misrepresent Respondent's position on choice of law. Respondent does *not* invoke Bahamian law only to the extent that it provides for limitation of liability, and Respondent does *not* "rely on U.S law to govern all *other* substantive and procedural aspects of this litigation." [Petition at p. 30] As Petitioners are well aware, the parties brought cross-motions for summary judgment on numerous issues, including liability, based on U.S. law. Respondent simultaneously moved for a determination that the case was

Petitioners do not contend that Bahamian law is the wrong choice if *Lauritzen* applies, and that question would be of little interest to this Court anyway since the application of well-settled law to a unique set of circumstances has no significance beyond the immediate case. Petitioners also do not contend that the application of Bahamian law is contrary to a choice of law clause in their ticket contract. It is not disputed that there was no choice of law clause in the ticket. Instead Petitioners argue that *Lauritzen* does not apply at all to this case because Petitioners sailed under a passenger ticket that *did not* contain a choice of law provision. This curious proposition has absolutely no support in law or logic and is in fact contrary to this Court's decisions in both *Lauritzen* and *Rhoditis*.

Petitioners are contending, in effect, that a foreign cruise line operating a foreign-flag ship on an entirely foreign voyage is not entitled to invoke foreign law under *Lauritzen* but must be governed by U.S. law unless it notifies passengers in advance that foreign law will apply. This is nonsense. Contractual notice is irrelevant to choice of law unless one of the parties is seeking to enforce a contractual choice of law provision. Petitioners have confused choice of law, which is a matter of public

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governed by Bahamian law. After the court ruled for Respondent on the choice of law issue and deferred deciding the rest, both parties rebriefed their Motions for Summary Judgment under Bahamian law and submitted extensive declarations from Bahamian attorneys. Respondent does not contend that the application of substantive Bahamian law to this case is limited in any way. Procedure and choice of law must of course be governed by the law of the forum.

policy and comity among nations, with the law of private contracts. Parties may agree among themselves that the law of a particular nation will govern their relationship, and such agreements are sometimes enforced; but when the parties do not make such an agreement, as they did not in this case – and of course they are not required to – there must be some way of determining what law will apply. With respect to maritime torts, it is settled beyond any doubt that the determination must be made on the basis of *Lauritzen* and *Rhoditis*.

II. THE UNPUBLISHED CALIFORNIA COURT OF APPEAL DECISION DOES NOT CONFLICT WITH DECISIONS IN OTHER JURISDICTIONS.

Respondent is not aware of any decision by a U.S. court – and Petitioners have cited none – standing for the proposition that *Lauritzen* and *Rhoditis* do not apply to a maritime tort action where there is a contract between the parties. Petitioners rely on a venerable line of decisions dating back to *The Majestic*, 166 U.S. 375 (1897), and forward through *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), to the effect that a forum selection clause, time limit, or limitation of liability provision in a cruise ticket is unenforceable unless the provision has been reasonably communicated to the passenger. Those cases are not in conflict with the Court of Appeal's decision here because the question here is not whether the agreement of the parties is enforceable but what body of law applies. As the California Court of Appeal stated,

> This is not an action on a contract. Neither party is seeking to enforce the terms of the ticket. An

> analysis of the passenger ticket would be relevant only if one of the parties were seeking to enforce a specific term of the ticket, such as a forum selection or choice of law provision, or a contractual clause limiting the time to bring an action or limiting the liability of the owners of the vessel. If the Kirmans were seeking to enforce a term of the ticket, then contractual choice of law would govern the rights and responsibilities of the parties, and the concepts of notice and reasonable communication would be applicable. That is not this case. [Appendix to Petition at p. 8a]

To put it another way, a cruise line is not required to notify passengers of a contract clause on which it does not rely and which does not exist. Reasonable notice has never been a factor in non-contractual choice of law analysis.

Petitioners contend that the existence of a contract between the parties in a tort case changes everything, but they cite no authority for this proposition. There were contracts between the parties in both of the seminal cases, *Lauritzen* and *Rhoditis*, and the existence of either a contract of employment or a contract of carriage is extremely common in maritime personal injury cases.[2] That is not a

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[2] The contracts in both cases contained choice of law provisions. This Court gave no weight to the Danish choice of law provision in the *Lauritzen* contract – although it held that Danish law applied on the basis of the ship's flag – and observed that a "contract [that] attempted to avoid applicable law" should not be enforced. 345 U.S. at 589. In *Rhoditis* this Court ignored a Greek choice of law clause, holding that U.S. law applied instead because of the vessel owner's U.S. base of

valid basis for distinguishing this case from *Lauritzen*. Petitioners also contend that *Lauritzen* and *Rhoditis* are not well suited to passenger cases; but this Court has held that *Lauritzen* applies to *all* maritime tort cases. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382 (1959). There has been no dissent or conflict on this point in the lower courts for nearly forty years. Petitioners are in effect asking this Court to renounce *Lauritzen*, *Rhoditis*, and *Romero* and to fashion new maritime choice of law principles for the foreign-based cruise industry; yet they fail to articulate what those principles ought to be and why.

Petitioners incorrectly contend that they are entitled to the application of U.S. law under contract choice of law principles because the ticket was purchased in the U.S. While it is settled that the place of the contract is relevant to choice of law in an action on the contract, this is not an action on the contract, and tort choice of law principles are very different from contract choice of law principles. This Court stated in *Lauritzen* that "We do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort action." 345 U.S. at 589. Further, "The practical effect of making the [place of contract] govern all tort claims during the service would be to subject a ship to a multitude of systems of law, [and] to put some crew [or

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operations. 398 U.S. at 308, 310. These decisions therefore not only indicate that *Lauritzen* and *Rhoditis* govern choice of law where there is a contract between the parties but also suggest that they govern even in the face of a choice of law provision in the contract.

passengers] in a more advantageous position than others. . . . " [Trial Court opinion at appendix p. 26a, quoting *Lauritzen*, 345 U.S. at 588]

In arguing that the tort must be governed by U.S. law because an action on the contract would be governed by U.S. law, Petitioners appear to be confused by a number of cases concerning the enforceability of choice of law clauses. E.g., *Milanovich v. Costa Crociere*, 954 F.2d 763 (D.C. Cir. 1992); *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955). In such cases the court applies forum contract choice of law principles to determine what law applies to the contract. It then decides whether the choice of law clause is enforceable under the law applicable to the contract. Those cases have nothing to do with the present case because there is no choice of law clause here, and Respondent is not seeking to enforce the contract.

Finally, Petitioners contend that they are entitled to the application of U.S. law because the ticket makes reference to certain U.S. statutes or simply because they expected that U.S. law would apply. They seem to argue that these references in the ticket constitute an "implicit" choice of law clause. The same argument, involving the same boilerplate references to U.S. statutes, was rejected by the First Circuit in *Jansson v. Swedish American Line*, 185 F.2d 212, 220 (1st Cir. 1950) (applying Swedish law), and Respondent has been unable to find any contrary authority. There is simply no such thing as an implicit choice of law clause in this or any other context. With regard to expectations, Americans who travel to the ends of the earth have no right to expect that U.S. law will follow them there. As the trial court pointed out, U.S.

travelers do not carry U.S. public policy around on their backs wherever they may go, and it would be "an unsophisticated and naive American traveler who honestly thought otherwise." [Appendix at p. 29a]

III. THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

Petitioners offer conclusory statements about the importance of the decision below and its impact on cruise industry; but these statements are nowhere supported in the record and could not be true. Although the Athens Convention came into force in 1989, and the decision of the Superior Court in *Kirman* was published in American Maritime Cases in 1994, there have been no reported instances, other than this one, in which a U.S. court has applied, or declined to apply, the Convention on a choice of law basis, and there have been no reported cases either relying on or disagreeing with the trial court's decision as reported in AMC. Petitioners cite only one unreported decision by a Magistrate that even mentions the trial court's decision in this case. See Petition at p. 9 fn. 10. Their "floodgates" argument therefore appears to be unfounded.

Respondents believe that cruise lines ordinarily will not invoke foreign law under *Lauritzen* for a few simple reasons. First, although the vast majority of cruise ships operate under foreign flags, the majority of cruise lines patronized by U.S. residents are nonetheless owned or operated by U.S. interests or are based in the U.S. Respondent is not aware of any case in which a U.S.-

based cruise line has urged a court to hold that a suit by a U.S. resident in a U.S. court should be governed by foreign law. Second, many cruise lines now employ tickets that incorporate the Athens Convention, or selected portions of it, whenever permissible, so that regardless of the vessel's flag or base of operations the Convention applies by contract rather than by virtue of choice of law principles. E.g., *Mills v. Renaissance Cruises*, 1993 AMC 131 (N.D. Cal. 1993); *Berman v. Royal Cruise Lines, Ltd.*, 1995 AMC 1926 (L.A.S.C. West. Dist. 1995). Whatever the reasons may be, it is clear from a review of reported decisions that the *Kirman* case and its rationale have attracted little interest.

CONCLUSION

The question of whether the choice of law principles in *Lauritzen* apply to tort claims by cruise passengers does not require resolution by this Court because the answer is obvious, and the California Court of Appeal got it right. *Lauritzen* applies to *all* maritime tort cases, *Romero*, 358 U.S. at 382, and the same choice of law principles apply whether or not there is a contract between the parties. There is simply no conflict or controversy on these issues in the lower courts.

The Petition should be denied.

Respectfully submitted,

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